

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

Mark Mariano

v.

Case No. 05-cv-25-PB

Warden, New Hampshire  
State Prison

NOTICE OF RULING

Re: Document No. 9, Motion for Summary Judgment

**Ruling:** I deny the motion for the following reasons: First, petitioner's claim that the trial court improperly amended the indictment is meritless. In rejecting this argument, the New Hampshire Supreme Court concluded "that the weapon was placed in the victim's mouth was not an element of the offense, but rather the means by which the victim committed the offense." See State v. Mariano, Case No. 2003-0553, Order dated July 8, 2004. The court then relied on its earlier opinion in State v. Doucette, 583, 590 (2001) to conclude that the trial court had not erred. Petitioner has not demonstrated that the state court's ruling on this point was contrary to or involved an unreasonable application of Supreme Court precedent. Second, petitioner's claim that the evidence was insufficient to support his conviction is frivolous. Third, petitioner failed to exhaust his state court remedies with respect to his ineffective assistance of counsel claims by filing a habeas corpus petition in state superior court raising this issue. On or before October 5, 2005, petitioner shall show cause why summary judgment should not be awarded to the defendant for the reasons expressed in this Order.

Entered by: Paul Barbadoro, U.S. District Judge

Date: September 5, 2005

cc: Mark Mariano, pro se  
Susan P. McGinnis, Esq.